SUPREME COURT, U. S.

FILED

JUL 30 1968

JOHN F. DAVIS, CLERK

No. 194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

CARSON PIRIE SCOTT & COMPANY, KROCH'S & BRENTANO'S, INC., THE FAIR, and RAY BRENNAN,

Petitioners,

v.

JOHN FACTOR,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ALBERT E. JENNER, JR.
PHILIP W. TONE
KEITH F. BODE
ROBERT E. PFAFF
Attorneys for Respondent, John Factor

Of Counsel:
RAYMOND, MAYER, JENNER & BLOCK
135 South LaSalle Street
Chicago, Illinois 60603

UNITED STATES LAW PRINTING CO., CHICAGO, ILL. 60618 LA keview 5-6581

SUBJECT INDEX

PAGE

Reasons for denying the writ 1

History of the litigation 3

The Court of Appeals properly determined that Section 24 of the Illinois Limitations Act does not require a Plaintiff to disprove charges of "bad faith." 7

The Court of Appeals properly reversed the District Court's findings of fact as "clearly erroneous" 12

Conclusion 19

CASES CITED

A.L.B.Theatre Corp. v. Loew's, Inc., 355 F. 2d 495 (7th Cir. 1966) 13

Factor v. Carson, Pirie Scott & Co., 393 F.2d 141 (7th Cir. 1968) 9, 10, 13, 14, 15, 17

Gleason v. Brazauskas, 70 Ill. App. 2d 276, 217 N.E. 2d 298 (1st Dist. 1966) 11

Goldman v. City of Chicago, 54 Ill. App. 2d 437, 203 N.E. 2d 703 (1st Dist. 1964) 11

Hardin v. Cass County, 42 Fed. 652 (W.D. Mo. 1890) .. 2

Lundstrom v. Winnebago Newspapers, Inc., 32 Ill. App. 2d 266, 177 N.E. 2d 643 (2d Dist. 1961) 10

Metalexport Co. v. Gen-O-Ral Processing Corp., 365 F.2d 178 (7th Cir. 1966) 13

Parkinson v. Hill, 66 Ill. App. 2d 405, 214 N.E. 2d 347 (1st Dist. 1966) 11

Parks v. City of Chicago, 50 Ill. App. 2d 100, 199 N.E. 2d 830 (1st Dist. 1964) 11

PAGE

Patrick v. Burgess Norton Mfg. Co., 56 Ill. App. 2d 145, 205 N.E. 2d 643 (2d Dist. 1965) 11

Robertson v. Western Bearings Co., 50 Ill. App. 2d 173, 200 N.E. 2d 48 (1st Dist. 1964) 11

Roth v. Northern Assurance Co., Ltd., 32 Ill. 2d 40, 203 N.E. 2d 415 (1964) 2, 7-8, 11

Ryan v. Intern'l. Brotherhood of Electrical Workers, 387 F. 2d 778 (7th Cir. 1967) 13

Sachs v. Ohio National Life Insurance Co., 131 F. 2d 134 (7th Cir. 1942) 9

Sehnert v. Schipper & Block, Inc., 168 Ill. App. 245 (2d Dist. 1912) 11

Surowitz v. Hilton Hotels Corporation, 383 U.S. 363 (1966) 3, 8

Tidwell v. Smith, 57 Ill. App. 2d 271, 205 N.E. 2d 484 (2d Dist. 1965) 10

United States v. United States Gypsum Co., 333 U.S. 364 (1948) 13

Wright v. Chicago Transit Authority, 43 Ill. App. 2d 408, 193 N.E. 2d 597 (1st Dist. 1963) 11

STATUTES

Ill. Rev. Stat. 1967, ch. 83, §24a 1-2, 4

28 U.S.C. §1332(a) 3, 15

FEDERAL RULES OF CIVIL PROCEDURE

Fed. R. Civ. P. 41 (b) 4

Fed. R. Civ. P. 52(a) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 194

CARSON PIRIE SCOTT & COMPANY, KROCH'S & BRENTANO'S, INC., THE FAIR, and RAY BRENNAN,

Petitioners,

v.

JOHN FACTOR,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Respondent prays that the Writ of Certiorari be denied.

REASONS FOR DENYING THE WRIT.

Petitioners have not demonstrated any grounds for the granting of the writ. In fact, this case is a classic example of a situation in which the writ should be denied.

1. This is an action for libel and invasion of right of privacy. Jurisdiction is predicated upon diversity of citizenship. The legal issues decided by the Court of Appeals

relate to the interpretation and applicability of Section 24 of the Illinois Limitations Act (Ill. Rev. Stat., 1967, Ch. 83, § 24a). The merits of the case (which have not been reached because of petitioners' success in diverting inquiry into the question of respondent's birthplace) are governed by state law. No question under the Constitution of the United States or any federal statute is involved.

2. There is no conflict among the circuits. Indeed, the only federal case cited by petitioners in which a plaintiff was barred on the "good faith" test which they and the trial court sought to impose upon respondent here, is *Hardin* v. *Cass County*, 42 Fed. 652 (W.D. Mo. 1890), an opinion interpreting a Missouri statute, which has not been cited for the proposition relied upon by petitioners in the 78 years since the case was decided.

3. No final judgment is involved. The Court of Appeals held that the District Court had erred in finding that respondent's cause of action was barred by an "implied" requirement of the Illinois Limitations Statute, and remanded the case for a trial on the merits.

4. The decision of the Court of Appeals rests on two alternative grounds, (a) that the trial court, in dismissing this action on grounds of limitations, misconstrued the Illinois Limitations Act, and (b) that, even assuming the correctness of the trial judge's interpretation of the Illinois statute, his findings that the evidence required dismissal were clearly erroneous. This Court, therefore, could not reverse unless it found that the Court of Appeals was wrong on both grounds.

5. The Court of Appeals, in remanding this case for a trial on the merits, acted consistently with the policy recently enunciated by the Illinois Supreme Court in construing Section 24 of the Limitations Act, *Roth* v. *Northern Assurance Co., Ltd.*, 32 Ill. 2d 40, 48, 203 N.E. 2d 415, 419 (1964), and with the policy of the Federal Rules of Civil

Procedure as construed by this Court (*Surowitz* v. *Hilton Hotels Corporation*, 383 U.S. 363, 373 (1966)), to encourage the disposition of litigation on the merits.

6. Respondent's earlier action was filed in 1959. Petitioners, who are well aware that a cause of action for libel does not survive, have, since March, 1963, diverted the energies of court and counsel away from the merits and into an inquiry as to where respondent was born some 75 years ago. Granting of the writ would only serve to further delay a decision on the merits.

7. In addition to these considerations, the record shows that the Court of Appeals was correct in determining (a) that the trial court misconstrued Section 24 of the Illinois Limitations Act, and (b) that the trial court's findings of fact were clearly erroneous.

HISTORY OF THE LITIGATION.

Respondent's first action for libel and invasion of privacy was filed in the District Court in December, 1959, shortly after the publication of a book entitled "The Stolen Years," a partially ghost-written autobiography of the late gangster, Roger Touhy. Jurisdiction was predicated upon the "alienage" clause of Section 1332(a) of the Judicial Code, since petitioners were and are citizens of Illinois and respondent was then an alien, allegedly a British subject. In 1963 petitioners moved to dismiss the 1959 action on the ground of lack of jurisdiction. On December 24, 1964, the district court dismissed the action on the ground that the respondent had failed to sustain his burden of proving the existence of the jurisdictional facts. In the court's view the evidence tended to indicate that respondent was born in Russian Poland, rather than in Great Britain. It followed, under the court's interpretation of Russian law, that respondent was, at the time of the

filing of the action, a stateless person and therefore unable to invoke the jurisdiction of the federal court under the alienage provision. The court stated that the action was dismissed "with prejudice," even though, under Federal Rule 41(b), a dismissal solely on jurisdictional grounds clearly could not operate as an adjudication on the merits of respondent's causes of action.

Thereafter, on September 16, 1965, respondent filed the instant action. It is undisputed that respondent had become an American citizen in 1963 and that he was a resident of California. Consequently, it is conceded that federal jurisdiction exists on the basis of diversity of citizenship.

Petitioners moved to dismiss the action on a number of grounds, including that of limitations. (R. 9-10.) Since the 1959 action had been commenced within the one-year Illinois limitations period for libel and right of privacy actions, the right to refile was based on Section 24 of the Illinois Limitations Act, which provides in pertinent part:

> "In any of the actions specified in any of the sections of this act . . . if the plaintiff . . . shall be nonsuited, then, if the time limited for bringing such action shall have expired during the pendency of such suit, the plaintiff . . . may commence a new action within one year after such judgment . . . given against the plaintiff, and not after." (Ill. Rev. Stat., 1967, ch. 83, § 24a.)

It is undisputed: (a) that the original one-year limitation period expired during the pendency of the 1959 action; (b) that the dismissal of the 1959 action for lack of jurisdiction constituted a "nonsuit" under Section 24; and (c) that the case at bar had been filed within one year after the dismissal of the 1959 action. In short, respondent has satisfied every requirement expressed in Section 24. (R. 11, 26.)

Nevertheless, the district court held that respondent's action would be barred by limitations, unless he could show that he had acted in "good faith" in making the allegations contained in the complaint in the 1959 action. The district court held that this meant that respondent must have believed in good faith that he was born in Great Britain when he prosecuted the 1959 action. The court then summarily determined this "good faith" issue against respondent on the basis of the record in the trial on the issue of jurisdiction in the 1959 action and forthwith dismissed this action. (R. 10-14.)

When respondent filed a motion to vacate on the ground, among others, that the court had determined this factual question against respondent without a hearing (R. 14-15), the court consented to receive evidence. (R. 15-16.)

Thereafter, a hearing was held, but the district judge, over respondent's objection, imposed upon respondent the burden of disproving petitioners' charges of "bad faith" in connection with the 1959 action. (R. 30.) Respondent testified that prior to 1918 he had assumed, without being told, that, like his brothers and sisters, he had been born in Lodz, Russian Poland. (R. 332-333.) In 1918 or 1919 his parents told him for the first time that he had in fact been born in Hull, England while his parents were on a visit there. (R. 333.) Respondent's former attorney testified that in 1928 respondent had consulted him for the purpose of making a will and had informed him that he had been born in England. (R. 34-35.) Thereafter, the attorney had occasion to investigate the question of respondent's birthplace. He interviewed a number of respondent's relatives. The affidavits prepared as a result of this investigation were placed in evidence. They contained detailed statements by respondent's mother and three of his brothers (including Max Factor, the nationally

known cosmetics manufacturer) that plaintiff had been born in Hull, England, while his parents were there on a visit. (Pls.' Exs. 1-8; R. 63; 194-212.) Respondent's sister and his son and two nephews each testified that over the years, commencing with their childhood, their parents and other older members of the family had told them that respondent was born in England. (R. 76-77, 84-87, 112-113, 164-67, 184-86.) Respondent also introduced the affidavit of an Englishman, Solomon Schultz, prepared in 1928, which declared that he remembered the occasion of respondent's birth in England in about 1892. (Pl's. Ex. 9; R. 213.)

Petitioners relied entirely upon their attempted impeachment of respondent as a witness and upon a series of exhibits, several of which contained statements by respondent that he had been born in Russia. These were identified by respondent, who explained them by stating that they had been prepared during the time that he had mistakenly assumed that he, like the other members of his family, had been born in Russia. (R. 332.)

On October 20, 1966, the trial court entered findings (largely cast in the language of a set of findings submitted by petitioners' counsel), concluding that respondent had not satisfied the trial court's requirement of "good faith." On this basis the court decided that the respondent's claims were barred by limitations and dismissed the action. The court also stated, although estoppel had not been pleaded and was not an issue, that respondent was estopped from relying on Section 24. (R. 16-28.)

THE COURT OF APPEALS PROPERLY DETERMINED THAT SECTION 24 OF THE ILLINOIS LIMITATIONS ACT DOES NOT REQUIRE A PLAINTIFF TO DISPROVE CHARGES OF "BAD FAITH."

Petitioners' argument that the Court of Appeals misconstrued Illinois law is erroneous. It is undisputed that no Illinois court and (until this case) no federal court applying Illinois law, ever barred a plaintiff from refiling a nonsuited action under Section 24 of the Illinois Limitations Act on the ground that the plaintiff had not acted "in good faith" in making the allegations in the complaint in the prior nonsuited action. Yet this unprecedented penalty was imposed upon respondent by the trial court, and petitioners seek to have this Court approve it as the settled law of Illinois. There is no basis for petitioners' position.

It is conceded that respondent has diligently pursued his cause of action since it accrued in 1959. It is also undisputed that he has met every requirement set forth in Section 24 of the Illinois Limitations Act for the refiling of his earlier nonsuited action within the period of the Statute of Limitations.

Yet, the trial court, at petitioners' urging, superimposed a "good faith" requirement as an implied additional condition, allegedly on the basis of the "spirit" of the statute. This action of the trial court not only took unusual liberties with the provisions of a state statute, but also ignored the recent authoritative exposition of the "spirit" and purpose of that statute by the Illinois Supreme Court. In *Roth* v. *Northern Assurance Co., Ltd.*, 32 Ill. 2d 40, 203 N.E. 2d 415 (1964), the Illinois Supreme Court overruled one of its prior decisions and construed Section 24 to be applicable to the refiling of actions dismissed earlier for want of jurisdiction. The facts in the *Roth* case, in which a prior action in the federal district court had been dis-

missed for want of jurisdiction, would seem to have presented a serious question with respect to the "good faith" of the plaintiff in asserting federal jurisdiction in the earlier action. Yet the Illinois Supreme Court, in analyzing the purpose and scope of Section 24, made no effort to apply any "good faith" test to the actions of the plaintiff there. The Illinois Supreme Court described the purpose of Section 24 as follows (32 Ill. 2d at 48, 203 N.E. 2d at 419):

> "The plain purpose section 24 is to facilitate the disposition of litigation upon the merits and to avoid its frustration upon grounds that are unrelated to the merits."*

The Court also held, quoting with approval from other cases, that in a case involving a diligent plaintiff there was every reason to give a liberal, expansive interpretation to Section 24 (32 Ill. 2d at 49, 203 N.E. 2d at 420):

> " ' . . . Statutes of limitations, like other statutes, must be construed in the light of their objectives. The basic policy of such statutes is to afford a defendant a fair

---

* This policy is identical to the policy of the Federal Rules as set forth by this Court in *Surowitz* v. *Hilton Hotels Corporation*, 383 U.S. 363, 373 (1966), an opinion in which this Court made clear its distaste for a kind of requirement of proof of "good faith" prior to reaching the merits, which is analogous to the "good faith" hurdle which petitioners seek to impose here. The court stated (383 U.S. at page 373):

> " . . . The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. These rules were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits. . . . "

> opportunity to investigate the circumstances upon which liability against him is predicated while the facts are accessible . . . . "when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of the opinion that a liberal rule should be applied." ' "

Since the "good faith" test imposed upon respondent by the trial court at petitioners' urging finds no support in the language or purpose of Section 24, and since it has never been applied by Illinois courts to bar any cause of action, the Court of Appeals was clearly correct in concluding that

> "we find no basis in law for holding that a plaintiff's reliance upon § 24 a *ipso facto* creates an issue of his good faith in doing so." *Factor* v. *Carson, Pirie Scott & Co.*, 393 F.2d 141, 147 (7th Cir. 1968).

It is not surprising, therefore, that closer examination reveals that the alleged authority for the requirement of "good faith" which petitioners purport to find in Illinois law is, in fact, non-existent.

Petitioners assert that this alleged requirement was "established" in Illinois by the Seventh Circuit decision in *Sachs* v. *Ohio National Life Insurance Co.*, 131 F. 2d 134, 137 (7th Cir. 1942). That case liberalized existing interpretations of Section 24 by permitting the refiling of an action dismissed for want of jurisdiction, even though more than ten years had elapsed from the date when the original action was filed. The statement relied upon by petitioners is contained in the following quotation from the court's opinion dealing with the purpose of Section 24 (131 F. 2d at 137):

> "The act is remedial, reflecting a legislative intent to protect the party who brings the action in good faith from complete loss of relief on the merits merely

> because of procedural defect. Such remedial statutes should be liberally construed, so as to prevent destruction of the purpose of the legislation."

Since no issue of good faith was raised in that case, and since the court's decision was in favor of the right of the plaintiff to refile his action, the Court of Appeals in this case was obviously correct in describing the use of the isolated and unexplained words "good faith" in the above quotation as "obiter dictum." The mere quotation of the language from the *Sachs* opinion, set forth above, by later Illinois cases cannot reasonably be construed as the adoption of a requirement that a plaintiff prove his "good faith" in making the allegations contained in his earlier nonsuited action as a condition for being permitted to refile under Section 24.

In addition, petitioners rely upon two specific Illinois cases. Neither supports their position. *Tidwell* v. *Smith*, 57 Ill. App. 2d 271, 205 N.E. 2d 484 (2d Dist. 1965), involved, as the Court of Appeals noted, a plaintiff who

> "attempted to use § 24a after his self-initiated delay, which the court held constituted a virtual abandonment of his cause of action, rather than for the purpose of affording a fair opportunity to try the case on the merits. . . . " *Factor* v. *Carson, Pirie Scott & Co.*, 393 F.2d 141, 148.

Even petitioners do not accuse respondent of lack of diligence in pressing for a trial on the merits.

The petitioners' last authority, *Lundstrom* v. *Winnebago Newspapers, Inc.*, 32 Ill. App. 2d 266, 177 N.E. 2d 643 (2d Dist. 1961), did not bar the plaintiff's refiling under Section 24. In response to a claim that the plaintiff had not acted in good faith in his earlier action, the court merely made the off-hand statement that "it does not necessarily follow" from the facts in the record "that

plaintiff did not act in good faith" in prosecuting the nonsuited action. Since the court did not indicate what would have been the "penalty" if bad faith had been found, and since the court did not remand for a hearing on the question of "good faith" even though there had been no hearing in the trial court, this off-hand comment can hardly serve to make the "good faith" test devised by petitioners an established doctrine in Illinois law.

Neither of these Illinois Appellate Court decisions is in any way inconsistent with the Illinois Supreme Court's controlling interpretation of Section 24 in the *Roth* case, *supra* (32 Ill. 2d 40, 203 N.E. 2d 415). The Court of Appeals correctly followed the *Roth* decision.

Furthermore, petitioners' assertion of the existence of a well established "good faith" exception to Section 24 ignores other Illinois cases dealing with refiling under Section 24. These cases establish that even though the dismissal was caused by inexcusable conduct on the part of plaintiff which prevented reinstatement of the original action, nevertheless the plaintiff may refile under Section 24, regardless of his fault in the prior action. *Patrick* v. *Burgess Norton Mfg. Co.*, 56 Ill. App. 2d 145, 205 N.E. 2d 643 (2d Dist. 1965); *Goldman* v. *City of Chicago*, 54 Ill. App. 2d 437, 441, 203 N.E. 2d 703, 705 (1st Dist. 1964); *Robertson* v. *Western Bearings Co.*, 50 Ill. App. 2d 173, 200 N.E. 2d 48 (1st Dist. 1964); *Wright* v. *Chicago Transit Authority*, 43 Ill. App. 2d 408, 193 N.E. 2d 597 (1st Dist. 1963) (abstract opinion); *Gleason* v. *Brazauskas*, 70 Ill. App. 2d 276, 217 N.E. 2d 298 (1st Dist. 1966) *Parkinson* v. *Hill*, 66 Ill. App. 2d 405, 214 N.E. 2d 347 (1st Dist. 1966) (abstract opinion); *Parks* v. *City of Chicago*, 50 Ill. App. 2d 100, 199 N.E. 2d 830 (1st Dist. 1964) (abstract opinion); *Sehnert* v. *Schipper & Block, Inc.*, 168 Ill. App. 245 (2d Dist. 1912). There is no inquiry

into (and indeed no judicial interest in) the question of whether plaintiff's inexcusable conduct has been caused by negligence or by bad faith. It is impossible to explain the opinions in all these cases upon the assumption that a requirement of proof of the "good faith" of the allegations in the complaints in the nonsuited actions lurks unexpressed in the background.

The frequent occurrence in Illinois of dismissals and of refilings under Section 24 also reveals a serious and harmful effect which adoption of the trial court's "good faith" requirement would have upon Illinois practice. Every refiling under Section 24 results from some kind of default, neglect or error in the prior action. If court decisions were to establish as a pre-condition for refiling that plaintiffs have acted "in good faith" in making the allegations in their complaints in the prior nonsuited actions, the plaintiff's "good faith" would be challenged in virtually every refiled action. It is obvious that the resulting preoccupation of the time of court and counsel with this type of collateral inquiry into a plaintiff's state of mind would be subversive and destructive of the purposes of Section 24 and of the public policy favoring the disposition of litigation on the merits.

THE COURT OF APPEALS PROPERLY REVERSED THE DISTRICT COURT'S FINDINGS OF FACT AS "CLEARLY ERRONEOUS."

Petitioners attempt to torture their disagreement with the alternative ground of the Court of Appeals decision which finds the district court's factual conclusions to be clearly erroneous into an important legal question amounting to a departure "from the accepted and usual course of judicial proceedings." This is nonsense. There is no assertion that the Court of Appeals for the Seventh Circuit has adopted improper standards for review of lower court deci-

sions. Even a cursory examination of the recent decisions of that Court reveals repeated affirmances based in part upon the principles of Fed. R.Civ.P. 52(a). See, e.g., *A.L.B. Theatre Corp.* v. *Loew's, Inc.*, 355 F. 2d 495, 499 (7th Cir. 1966) (Pet. p. 8); *Ryan* v. *Intern'l. Brotherhood of Electrical Workers*, 387 F. 2d 778 (7th Cir. 1967), both affirmances of decisions by the same trial judge who rendered the findings in this case.

Of course, Rule 52(a) does not require a Court of Appeals to accept automatically any findings of fact made by a trial court. This Court made that clear in enunciating the standards which have been followed in the review of judges' decisions by the federal courts, both before and after the adoption of the Federal Rules:

> "The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. *A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.*" *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). (Emphasis supplied.)

Petitioners themselves concede the correctness of the proposition that a Court of Appeals may reject findings which are "manifestly against the weight of the evidence." (Pet. p. 8) *Metalexport Co.* v. *Gen-O-Ral Processing Corp.*, 365 F.2d 178, 180 (7th Cir. 1966).

The Court of Appeals followed these standards in the case at bar. As the Court stated (*Factor* v. *Carson, Pirie Scott & Co.*, 393 F.2d 141, 150):

> "Actually we must realistically face a situation where, in order to sustain the district court's findings

> herein, it would be necessary for us, not merely to disregard the mass of evidence in this record tending to support plaintiff's contention, but also to implicitly conclude that the witnesses and affiants, by which such evidence has been established, are unworthy of belief, either because of perjury or an amazing incapacity to remember important matters of family pedigree."

In other words, the Court of Appeals concluded that the findings were manifestly against the weight of the evidence and left the reviewing court with the definite and firm conviction that a mistake had been committed. Those conclusions of the Court of Appeals were clearly justified.

Before even reaching an examination of the evidence, it is obvious that the findings contain a number of fundamental flaws which destroy their value and weight. First, as the Court of Appeals noted (*Factor* v. *Carson, Pirie Scott & Co.*, 393 F.2d 141, 143, 147-48), the trial court erroneously placed the burden of proof upon respondent.*

Petitioners argue as a separate point (Pet. p. 13), without the citation of any authority, that the Court of Appeals should have cured the error caused by the improper allocation of the burden of proof by remanding the case to the trial court for new findings of fact. This suggestion makes no sense. The Court of Appeals, as an alternative ground for its decision, concluded that the trial court had misinterpreted Section 24 of the Illinois Limitations Act and therefore that the entire issue upon which evidence had been received was immaterial. Furthermore, the other errors in the findings of fact and defects in petitioners' proof in the trial court required reversal. Petition-

---

* In doing so the trial court made no reference to the "burden of persuasion"—"burden of going forward" distinction (Pet. p. 12, n. 11) suggested for the first time by petitioners in their brief in the Court of Appeals. (R. 30-31.)

ers have never suggested, until the filing of their petition for certiorari in this Court, that the case should be remanded for new findings of fact. The diversion of the energies of court and counsel into inquiries relating to respondent's birthplace have gone on long enough. The time has come to proceed with the merits of the case without further delay.

Second, the trial court invoked against the respondent the doctrine of estoppel although that defense had not been pleaded and although petitioners admitted on the appeal that it was not an issue in the case. *Factor* v. *Carson, Pirie Scott & Co.*, 393 F.2d 141, 146-147, 150.

Third, in order to prove their oft-repeated charge and to sustain the trial court's finding that respondent was "guilty of perpetrating a fraud in an effort to create a basis for Federal jurisdiction" (Pet. p. 18), petitioners would have had to prove (1) that respondent had knowledge of the Soviet law which denied him Russian citizenship even though he had been born in Russian Poland; (2) that respondent knew that he was a stateless person; and (3) that he believed that a stateless person could not invoke federal jurisdiction under the alienage clause of 28 U.S.C. §1332. Petitioners introduced no evidence whatever to prove any of these critical contentions. Yet the trial court wholly overlooked this defect and ignored the entire question in his findings of fact.

Turning from these threshold defects to a consideration of the evidence in the record, the fatal flaw in the trial court's findings and in petitioners' reasoning is that both necessarily presuppose a wholesale conspiracy to commit perjury on the part of a large number of witnesses and affiants whose testimony has not been impeached in any way. The Court of Appeals noted this in the passage quoted above.

Petitioners emphasize chiefly the trial court's disbelief of respondent as a witness, but the bulk of respondent's evidence consisted of exhibits, testimony and affidavits from persons living and dead who were not impeached and who categorically corroborated respondent's testimony that he was born in Great Britain.

The decision of the Court of Appeals was based upon the virtual absence of any affirmative evidence from petitioners and upon the impossibility of disregarding this mass of unimpeached evidence.

Petitioners ask this Court to follow the trial court in disregarding the sworn statements and testimony, not only of respondent, but also of Max Factor (the nationally known cosmetics manufacturer), Nathan Factor, Daniel Factor, Leah Factor, Dena Lupu, Jerome Factor, Monte Factor, Ted Factor, Solomon Schultz, George Gayle Gilbert, Jr. and Max Swiren. Since the testimony and recollection of these witnesses and affiants with respect to the critical matter of respondent's birthplace was clear and definite, none of this testimony can be explained away on the theory of mistake. These witnesses and affiants were either telling the truth or committing deliberate perjury. Since the record contains no evidence to impeach their veracity, the trial court's acceptance of a theory of wholesale perjury was clearly erroneous.

Petitioners seek to rehabilitate the trial court's findings by contending that attorneys Gilbert and Swiren, respondent's son, Jerome Factor, and respondent's nephews, Monte Factor and Ted Factor, need not have been lying because their testimony consisted of repeating what they had been told by members of the Factor family who are

now deceased.* Of course, all pedigree evidence is of this character, especially where, as here, the event being inquired into occurred many years ago so that all eyewitnesses are dead. But, apart from that factor, petitioners' revised theory only serves to require them to espouse an even more incredible version of the facts.

If Messrs. Gilbert and Swiren were not lying, then, according to petitioners' theory, respondent lied to Mr. Gilbert when he consulted him for the purpose of making a will in 1928. As the Court of Appeals properly noted, "On such an occasion a man would ordinarily have no conceivable purpose for concealing the place of his birth." *Factor* v. *Carson, Pirie Scott & Co.*, 393 F.2d 141, 150. Further, respondent's mother would have had to lie successfully to attorney Swiren and respondent's brothers to attorney Gilbert in a whole series of interviews.

Similarly, the notion that the testimony of respondent's nephews, Monte Factor and Ted Factor, and respondent's son, Jerome Factor, can be explained away on the ground that they received false information from respondent and his brothers and sisters presupposes a fantastic conspiracy on the part of respondent's family which required respondent's brother and sister-in-law, Nathan and Rose Factor, to lie repeatedly to their minor children and nephew in the family home in the 1920's; required respondent to lie to his young son and required respondent's sister Gussie to lie to her nephew, while he was visiting in her store in about 1926.

---

* This argument, of course, weakens the force of petitioners' insistence upon the trial court's right to disbelieve witnesses on the basis of their demeanor, since Jerome Factor and George Gilbert were the only witnesses, other than respondent, whose demeanor the trial judge had an opportunity to observe.

Petitioners make an effort to support the trial court's rejection of the mass of evidence adduced by respondent by suggesting that the witnesses had motives to falsify. These arguments were thoroughly canvassed in the briefs in the Court of Appeals and have no merit. They are predicated largely upon a classic example of circular reasoning or "bootstrapping". Petitioners contend that respondent and all of the members of his family lied for forty years inside and outside the family in order to protect respondent from prosecution for fraudulently obtaining a British passport. But the record contains no evidence whatsoever to support the conclusion that the respondent's British passport was fraudulently obtained. Petitioners' theory is based upon the *assumption* that the "fraud" consisted of respondent's assertion that he was born in Great Britain whereas he knew for a fact that he was born in Russian Poland. However, the "fact" thus assumed by petitioners (respondent's "bad faith" in asserting that he was born in Great Britain) was the precise fact that they had undertaken to *prove* in order to sustain their burden of proof.

In addition to its circularity, the "fraudulent passport" theory is predicated upon the assumption that respondent was forced to adopt the complicated ruse of fabricating a British birthplace because it was the only possible way for him to obtain a passport after the Russian Revolution of 1917. But, even if one were to assume the truth of the petitioners' contentions concerning respondent's birthplace, he could have avoided the false dilemma posed by the petitioners by the simple process of securing American citizenship (for which he was eligible on the basis of eleven years of residence in the United States) and obtaining a passport as an American citizen.

Whether petitioners' theory is that all of the witnesses and affiants whose testimony was presented on behalf of the respondent were perjurers or that 80% were perjurers who engaged in an amazingly thorough 40-year conspiracy to deceive the others, the contentions are incredible and any findings based upon them could not stand.

CONCLUSION.

Both of the alternative grounds of the Court of Appeals' decision are in accordance with the provisions and policies of the Federal Rules and with the letter and purpose of the applicable Illinois law. The petition should be denied so that the case may return to the district court and there, at long last, proceed to a hearing on the merits of the complaint.

Respectfully submitted,

ALBERT E. JENNER, JR.
PHILIP W. TONE
KEITH F. BODE
ROBERT E. PFAFF
Attorneys for Respondent,
John Factor.

Dated: July 29, 1968.

Of Counsel:
RAYMOND, MAYER, JENNER & BLOCK
135 South LaSalle Street
Chicago, Illinois 60603